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Nos. 374 and 375

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE TIMES-PICAYUNE PUBLISHING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, APPELLANT

v.

THE TIMES-PICAYUNE PUBLISHING COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court for the Eastern District of Louisiana (R. 1233) is reported in 105 F. Supp. 670.

JURISDICTION

The judgment of the district court was entered on July 1, 1952 (R. 1263). The petition for ap-

peal in No. 374 was allowed on July 30, 1952 (R. 1267) and in No. 375 on August 29, 1952 (R. 1278). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989, 15 U. S. C., Supp. V, 29. Probable jurisdiction was noted on November 10, 1952 (R. 1284).

QUESTIONS PRESENTED

The Times-Picayune Publishing Company publishes in New Orleans the only daily morning newspaper, which is the dominant paper of the city, and a daily evening newspaper. A competitive daily evening paper is also published in New Orleans. The Publishing Company's contracts do not permit purchase of classified or general (i. e. national) advertising in its morning paper separately from its evening paper. The judgment which the district court entered prohibits such tying contracts.

The appeal in No. 374 presents the questions:

(1) Whether the Publishing Company's classified and general advertising contracts are in unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

(2) Whether the defendants, by their adoption and enforcement of these contracts, are engaged in an unlawful attempt to monopolize trade and commerce in violation of Section 2 of the Sherman Act.

The appeal in No. 375 presents the question:

(3) Whether the prohibitions proposed by the Government should be substituted for those of paragraph C of Section V of the judgment below, in order to provide effective relief.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SECTION 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * [15 U. S. C. 1].
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * [15 U. S. C. 2].
>
> * * * * *
>
> SEC. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in

their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations * * * [15 U. S. C. 4].

STATEMENT

Proceedings below

The United States brought this proceeding under Section 4 of the Sherman Act against The Times-Picayune Publishing Company, a Louisiana corporation which publishes in the City of New Orleans the Times-Picayune (a daily morning and Sunday newspaper) and the New Orleans States (a daily evening newspaper), and four of its officers. The Publishing Company and two of its officers (John F. Tims, Jr., First Vice President and General Manager, and Aubrey F. Murray, Advertising Director) are the appellants in No. 374, and the appellees in No. 375.[1] We shall refer to these parties as appellants and to the Publishing Company as the appellant corporation.

The complaint charged, so far as is now material, that various contracts made by appellant corporation for the sale of advertising space in

[1] Of the other two individual defendants, the district court dismissed the complaint as to Donald W. Coleman (R. 1263), and L. K. Nicholson, President of the Publishing Company (Fdg. 3, R. 1253), died after the filing of the appeals.

its newspapers are in unreasonable restraint of interstate commerce, in violation of Section 1 of the Sherman Act, and that the appellants had attempted, by means of such contracts, to monopolize a part of interstate commerce in violation of Section 2 of the Act (complaint (pars. 18, 21), R. 5–6).[2]

At the trial the Government presented the testimony of 49 witnesses and introduced in evidence 145 exhibits.[3] The Government's witnesses were, in the main, officers or key employees of appellant corporation or representatives of advertisers or advertising agencies, and the Government's documentary evidence consisted of rate cards of the appellant corporation, letters or memoranda by or to its officers or agents, and certain statistical compilations.[4] The defendants called 12 witnesses

[2] The complaint also charged (pars. 19–20) that the appellants conspired to restrain and to monopolize interstate commerce, but the Government did not press these charges before the district court (R. 1234). The Government also has not appealed from findings of the district court (Fdgs. 9-11, R. 1254) which determined adversely certain allegations of the complaint.

[3] Part of the Government's oral and documentary evidence is not material to the issues before this Court and is not included in the printed record in this Court.

[4] The statistical compilations are based on data published by Media Records, Inc., "the accepted measurement of newspaper lineage" (R. 41). We understand that appellants do not dispute the accuracy of these compilations, but urge that

and introduced in evidence 24 exhibits. Their evidence on the issues before this Court consisted chiefly of statistical and accounting compilations or evidence directed toward establishing that appellant corporation publishes one newspaper with daily morning, daily evening, and Sunday editions, rather than, as found by the district court, two separate and distinct newspapers, the morning and Sunday Times-Picayune and the evening New Orleans States (which will be called the States).

About a year after the completion of the trial, the district court (Judge Christenberry) filed an opinion holding that certain of the appellant corporation's contracts with advertisers are in unreasonable restraint of trade and that appellants' use and promulgation of these contracts constituted an unlawful attempt to monopolize a part of interstate commerce (R. 1233–52). The principal facts which the court found to be established (R. 1252-61) may be briefly stated.

The only newspaper published in New Orleans other than the Times-Picayune and the States is the New Orleans Item (referred to herein as the Item), an evening newspaper published by The Item Company, Monday through Friday, with a Sunday issue which comes out on Saturday (Edgs. 13-14, R. 1255). The Times-Picayune is

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their significance is qualified by certain statistical compilations which the defendants put in evidence.

the only daily morning newspaper published in New Orleans (Fdg. 15, R. 1255).[5] It has an enormous advantage over each of the two evening newspapers in circulation, in advertising lineage, and in number of pages published (*ibid.*). It is "dominant" in its trading area, and newspaper advertisers who wish to cover the New Orleans market must advertise in the Times-Picayune (Fdgs. 15, 17; R. 1255, 1256).

Appellant corporation has published the Times-Picayune as a morning and Sunday newspaper since prior to 1933 (Fdg. 6, R. 1253). In that year it acquired the States as a going evening newspaper, and it has continued to publish the States (Monday through Saturday) as a separate evening newspaper (Fdgs. 9, 12; R. 1254, 1255). The Times-Picayune and the States have substantially different readers, separate news and feature content, and radically different make-up and appearance (Fdg. 12, R. 1255). In fact, appellant corporation and its officers have frequently stressed the separate and distinct character of the two papers (Op., R. 1236-7).

Advertising in New Orleans newspapers is commonly divided into three principal categories, classified, local display (sometimes called retail), and general (sometimes called national) (Fdg. 18, R. 1256). As to two of these categories, appellant corporation has adopted rate cards which

[5] On Sundays, the appellant corporation publishes the Times-Picayune-New Orleans States (Fdg. 6, R. 1253).

permit advertising only as a unit in both the Times-Picayune (daily) and the States (daily) and has refused to sell advertising space in either paper separately (Fdgs. 19, 25; R. 1256, 1257). This practice was adopted for classified advertising in 1935 and was extended to general advertising on February 1, 1950 (*ibid.*). The result has been to force many classified and general advertisers to purchase unwanted space in the States, and to give it a commanding lead over the Item in these two categories of newspaper advertising (Fdgs. 21-22, R. 1256-7; Fdgs. 28, 29; R. 1258-9).

The court held that sale of advertising upon terms which require use of the same advertisement in both the States and the Times-Picayune constitutes the use of a tying device to restrict and limit competition and exploits the Times-Picayune's monopoly position in the morning field to gain an advantage in trade over the one competing evening newspaper, the Item (Op., R. 1245-9). Contracts having such purpose and effect were held to fall squarely within the prohibitions of Section 1 of the Sherman Act (*ibid.*). The court further held that the appellants' utilization of tying contracts to cut the Item off from many potential purchasers of advertising space constituted an unlawful attempt to monopolize a part of interstate commerce (Op., R. 1249-52).

Following the submission of proposed findings and conclusions by both the plaintiff and the defendants, the district court entered its findings of fact (R. 1252),[6] conclusions of law (R. 1262), and final judgment (R. 1263).

The injunctive provisions of the judgment are found in Section V (R. 1264-5). Paragraph A enjoins appellant corporation from selling advertising space in any newspaper published by it "upon the condition, expressed or implied, that the purchaser of such space will contract for or purchase advertising space in any other newspaper published by it." Paragraph B enjoins it from refusing to sell advertising space separately in each newspaper which it publishes. Paragraph C enjoins it from using its "dominant position" in the morning field "to sell any newspaper advertising at rates lower than those approximating either (1) the cost of producing and selling such advertising or (2) comparable newspaper advertising rates in New Orleans." Paragraph C is subject to the proviso that the advertising rates initially adopted by appellant corporation after the judgment becomes final shall, with due notice to the Attorney General, be presented to the court for "approval" under the terms of Section V, and

[6] The court's findings are not confined to the facts stated in its opinion and include additional facts which the defendants deemed material and proposed for adoption.

that "subsequent rate cards may thereafter be presented for approval."[7]

The appeal in No. 374 attacks, in addition to various findings of fact made by the district court, its holding that the appellant corporation has been a party to contracts in unreasonable restraint of trade, and its holding that appellants' adoption and enforcement of such contracts was a forbidden attempt to monopolize. The Government's appeal in No. 375 relates solely to the adequacy of the relief granted by the district court. The basis for its appeal is that the judgment below does not effectively bar appellants from adopting unit rates for advertising which in form are optional but which in substance utilize the leverage of the Times-Picayune's monopoly position in the morning field to prevent and restrain freedom of competition for advertisers in the evening field. The Government contends that it was error not to incorporate in the judgment certain prohibitions proposed by it designed to prevent evasion of the basic prohibition against tying contracts.

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[7] The judgment also requires appellant corporation to notify all its advertisers and advertising agents of the terms of the judgment (Sec. VI, R. 1265), gives representatives of the Department of Justice the customary visitorial rights relating to matters covered by the judgment (Sec. VII, R. 1265–6); and provides that it shall go into effect 30 days after the judgment becomes final (Sec. II, R. 1263).

Appellants' advertising contracts

The basic facts in the case have already been set forth. The findings (Fdgs. 33–37, R. 1260–1) on the interstate aspects of appellants' business and the restraints imposed are not questioned and need not be detailed. The balance of the Statement will deal with the findings and supporting evidence relating to appellants' advertising contracts and their effect. In the Argument we will refer to the evidentiary support for other findings of the court which are assailed.

We discuss appellants' advertising contracts separately for each of the three main categories of newspaper advertising.

1. Classified advertising

Appellant corporation, which acquired the States as a going newspaper in 1933 (*supra*, p. 7), has at all times since March 1935 required classified advertisers to purchase such advertisements in the Times-Picayune and the States as a unit, and has refused to sell such advertising in the morning or evening newspapers separately (Fdg. 19, R. 1256).[8] In 1934, one year prior to the adoption of the unit rule[9] for classified

[8] Only advertising from a small area across the river from New Orleans, which is known as "over-the-river" classified advertising and which represents such a very small part of total classified as to be relatively unimportant, was excepted from the unit rule (*ibid.*).

[9] The unit rule is sometimes called forced combination rates.

advertising, the States carried less than one-half the lineage of such advertising carried by the Times-Picayune (Fdg. 21, R. 1256–1257). By 1936, the first full year after adoption of the unit rule, the classified lineage of the States had, as was inevitable, risen to a par with that of the Times-Picayune (*ibid.*). And during the fifteen years (including 1950) in which the unit rule has been in effect, the spread between the classified lineage in each of appellants' newspapers and that in the Item has steadily increased (*ibid.*). In 1950 the Times-Picayune and the States each carried more than double the lines carried by the Item (*ibid.*). The States, which carried 35% of the classified advertising lineage in the evening field in 1934, carried 68% of such lineage in 1950 (*ibid.*).[10]

The perpendicular climb in the States' lineage following adoption of the unit rule and the steady expansion in its share of the lineage in the evening field amply support the court's finding that a major portion of the States' increase in lineage resulted from appellants' use of the compulsory unit rule (Fdg. 22, R. 1257).

The court also found that the unit rule required many classified advertisers to purchase space in the States which they did not want

[10] The facts set forth above, as found in Finding 21, are established by Ex. G–1061 (R. 1448), which gives the lineage of classified advertising appearing in the Times-Picayune, the States and the Item from 1933 through 1950.

(Fdg. 22, R. 1257). The finding is supported by the testimony of Government witnesses representing a sampling of classified advertisers." It is

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[11] McChesney, R. 490–491; Jeansonne, R. 494; Hussey, R. 496, 499–500; Kirschman, R. 502.

E. g., McChesney (R. 590):

The COURT. If the forced combination rate were not in effect, would you take the States?

The WITNESS. No, sir. I don't believe I would.

The COURT. You say, you don't believe you would?

The WITNESS. I know I wouldn't.

The COURT. You mean, you would advertise in the Picayune and in the Item?

The WITNESS. Yes, * * *.

Jeansonne (R. 494):

Q. What effect, Mr. Jeansonne, does this requirement that you must take both papers have upon you in your selection?

A. Well, we are budgeted as to the amount of money we can spend on advertising; and we feel that the Picayune is the morning newspaper, and I, personally, prefer the Item as the afternoon newspaper.

Q. If you were not required to purchase the New Orleans States, would you purchase it?

A. No. I don't think I would.

Hussey (R. 496):

Q. If you were not required to purchase the morning Times-Picayune and the afternoon States, as a unit, how would you prefer to place your afternoon advertising?

A. I would stay in the Picayune for seven days in the week in the morning and then I would probably split my advertisement in the States and in the Item[.] What I mean by that: I would go in the Picayune every morning and then I would probably go three days a week in the Item and four in the States, but I would only stay in one afternoon paper once a week.

Then, the next week, I would drop back to four days in the other afternoon paper, but I would stay in the Picayune at all times.

further supported by the self-evident fact that the unit rule compelled advertising in the States even though advertising in the morning paper would meet the advertiser's needs. The court in its opinion (R. 1240) noted that many retailers use classified advertising and that appellant corporation's Manager of General Advertising had explained its failure to extend the unit rule to local display advertising upon the ground that this would be an imposition on retail advertisers, who "gear their advertising to produce immediate over-the-counter results, and * * * may be sold out by 11 o'clock in the morning" (R. 78–79, 247–248). The court pointedly observed that appellants offered no explanation as to why it was not equally an imposition, *i. e.*, enforced purchase of unwanted space in the evening paper, to apply the unit rule to classified advertising (R. 1240).[12]

Under the unit rule, a classified advertiser desiring to reach the New Orleans market must use the States unless he wishes to confine his

[12] When asked if this was not also true, appellant Tims stated only that it was "not to the degree" (R. 248). The colloquy continued (*ibid.*):

Q. You do have a great number of classified advertisers who are seeking quick results, do you not?

A. Yes; I am sure there are.

Q. And frequently the first run of the ad satisfies the customer's advertisement, does it not?

A. I am sure. You may lose your handkerchief and try to get in the States this afternoon, and maybe it is sold [found] by the time the States comes out to him.

advertising to the Item, an evening paper having only 29% of the total Louisiana circulation of New Orleans daily newspapers.[13] In these circumstances, the inference is compelling, and the district court found (Fdg. 22, R. 1257), that the unit rule forces many classified advertisers to take unwanted space in the States.

2. General advertising

Prior to 1950, general advertisers could purchase advertising space in the Times-Picayune and the States separately. They were also offered, from 1933 to 1940, a combination rate, lower than the sum of the individual rates, for advertisements carried in both papers. In 1940 general advertisers were offered a reduced rate if they contracted to purchase more than 10,000 lines in both the Times-Picayune (daily) and the States, or in both the Times-Picayune-New Orleans States (Sunday) and either the Times-Picayune (daily) or the States. This reduced rate was offered, with some changes in detail, for ten years. (Fdgs. 23–24, R. 1257.)

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[13] 1950 circulation in Louisiana of New Orleans newspapers (daily) (Fdg. 34, R. 1260):

Paper	*Circulation*
Times-Picayune	169,147
States	99,131
Total Times-Picayune and States	268,278
Item	108,256
Total three papers	376,534
Item's percentage of total of three papers, 29%	

Appellant corporation applied the unit rule to all contracts for general advertising made on or after February 1, 1950 (Fdg. 25, R. 1257). The rule permitted general advertisers to purchase space only in both the Times-Picayune (daily) and the States, and barred advertising in either daily paper separately (*ibid.*).[14] Adoption of the rule resulted in an increase of more than 30%, from 1949 to 1950, in the States' general-advertising lineage (Fdg. 28, R. 1258). Its lineage rose sharply in 1950 and, after unexpired contracts had been completed, its lineage equalled that of the Times-Picayune although during the years 1946–1949 that paper had carried over 50% more general advertising than either the States or the Item (*ibid.*). After the adoption of the compulsory unit rule the States secured a commanding lead over the Item notwithstanding a slight gain by the Item in 1950 in its lineage of general advertising (*ibid.*).[15]

Appellant corporation is able to enforce the unit rule only because of the dominant position of the Times-Picayune in the New Orleans trading area (Fdg. 31, R. 1259).[16] Adoption of the

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[14] They could also purchase space in the daily morning paper plus the Sunday paper or in the daily evening paper plus the Sunday paper (*ibid.*).

[15] The findings as to the effect of application of the unit rule to general advertising are fully supported by the Government's statistical evidence compiled from Media Records, Inc. (Exs. G–107A–G–108B, R. 1449–52).

[16] For supporting evidence, see *infra*, pp. 17, 28–29, 34–35.

rule caused some general advertisers involuntarily to increase their lineage in the States or involuntarily to add it to their schedule (Fdg. 29, R. 1258).[17] Indeed, under the unit rule every advertiser who deemed it essential to use the Times-Picayune was constrained to use the States also. Because of the rule, some general advertisers bought space in the States which they would not

[17] The following witnesses testified to this effect: Margules, R. 322–323; Erath, R. 394; Klein, R. 405; Hicks, R. 421–422; Short, R. 329–330; McGinnis, R. 387–388.

E. g., Hicks (R. 422):

Q. Could you tell me then why you added The States to your advertising list in New Orleans in October 1950?

* * * * *

A. That was the only way we could purchase the Times-Picayune at that time; we had to buy The States with it.

Short (R. 330):

Q. Do you recall whether or not at the time you began to use the States for Eastman Kodak advertising, you wished to use the States?

A. No. We did not.

Q. Will you tell the Court the particular reason why you began to use the New Orleans States for Eastman Kodak advertising?

A. Because we had to buy the forced combination.

Erath (R. 394):

Q. Your first choice was the Times-Picayune?

A. That is right.

Q. What was your second choice in 1950?

A. The Item.

Q. Well, could you explain, then, the particular reason why you added the States' advertising lineage to your schedule in 1950, when you did not have it in 1949?

A. Well, it was a forced combination after January 30th.

have purchased in either afternoon paper,[18] and others bought space in the States which they otherwise would have purchased in the Item (*ibid.*).[19]

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[18] For supporting testimony, see preceding footnote.

[19] The following witnesses testified to this effect: Einstein, R. 297–299; Johnson, R. 357–359; Pumpian, R. 380–381; Scandlin, R. 398; Marcuse, R. 424; Margules, R. 322–323.

E. g., Margules (R. 322):

Q. Could you tell us whether or not the amount of lineage that you took in the Item in the latter part of 1950 was approximately the same proportion that you had taken in the year 1949 and early '50?

A. No, it was not. It was less.

* * * * *

Q. Would you tell the Court the particular reason that occasioned the reduction in the amount of advertising you took in the Item Newspaper?

A. Well, for the New Orleans market we did not increase the amount of money we appropriated for newspaper advertising, and since I was taking the States because of the new arrangement the paper had. I did not have sufficient money to continue in the Item at the rate that I previously had.

Einstein (R. 298):

Q. Could you give us the particular reason or reasons that occasioned the discontinuance of the Item newspaper for Cream of Kentucky advertising?

A. Well, as I say, we were buying the Times-Picayune and the Item. We were limited to a budget in New Orleans, and when our contract expired, we were subject to using the forced combination and we just didn't—our money went so far—.

Pumpian (R. 380):

Q. Will you state, Mr. Pumpian, your reason or reasons for discontinuing the Times-Picayune-Item combination and returning to the Times-Picayune-States combination?

The court found that appellants' intention in adopting the unit rule on all general advertising was to prevent general advertisers from making an "untrammeled choice" between the States and the Item (Fdg. 31, R. 1259). This would appear self-evident; when appellants offered to advertisers only a package which included the Times-Picayune, they necessarily prevented untrammelled choice between the States and the Item on the basis of the respective merits of those two papers. A further purpose of appellants in adopting the unit rule for all general advertis-

A. The unit combination of the Times-Picayune and States, which I believe went into effect February, 1950.

Marcuse (R. 424):

A. We were using the Times-Picayune and the Item and then the Times-Picayune went into a forced combination with the States, I believe, and we didn't have enough money to run in the forced combination and the Item, so we went into the Times-Picayune and States.

Johnson (R. 357–358):

Well, when we did have the option, we quite often used the Times-Picayune and the Item. Those are the two newspapers.

* * * * *

A. * * * Then, after that, we started in the fall schedule and we used the Times-Picayune and States, because we needed that to get the best possible coverage; and, since we had to buy the combination, why, we did not have any additional money to use the Item.

* * * * *

A. Well, I think that with a smaller budget, we weren't able to use all three papers; and, I believe, with the combination, we needed the coverage of the Times-Picayune and the States.

ing was "to substantially diminish the competitive vigor of the Item" (Fdg. 31, R. 1259).

These findings are supported by the evidence and other findings based thereon. The expenditures of general advertisers are budgeted and only a limited amount is placed in newspapers in any one city (Fdg. 29, R. 1258).[20] In these circumstances, when advertisers used the States involuntarily because of the unit rule, this necessarily restricted the Item's potential market for the sale of advertising space. And the court found that as a result of application of the unit rule, some general advertisers completely abandoned use of the daily Item,[21] while others reduced their lineage in that paper (Fdg. 29, R. 1258-9).[22]

Application of the unit rule to general advertising was agreed upon at a meeting in November 1949 attended by appellant corporation's President (Nicholson), its Vice President (Tims), its Manager of General Advertising (Ladreyt), and Messrs. Jann and Kelley, the principal officers and stockholders of the company (Jann & Kelley) which represented appellant corporation in the sale of space to general advertisers (R. 72–3,

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[20] Almost all advertisers called by the Government so testified.

[21] The following witnesses testified to this effect: Einstein, R. 298–9; Johnson, R. 357–9; Pumpian, R. 380–1; Scandlin, R. 398; Marcuse, R. 424; Freifield, R. 285. See note 19, pp. 18–19, *supra*.

[22] The following witnesses testified to this effect: Margules, R. 322–3; Harris, R. 367.

256–7). On November 26, 1949, shortly after this meeting, Mr. Kelley prepared a memorandum setting forth the reasons for subjecting general advertising to the unit rule (R. 93).[23] The memorandum states in part (Ex. G–45, R. 1357):

> We anticipate that a relatively few accounts which have formerly used the Times-Picayune exclusively or the other evening paper [the Item] in conjunction, may endeavor to prevent the "old order changeth." In those cases be firm. The policy has been *set*.

It further significantly states (*ibid.*):

> Last, but not least, this single unit plan ought to eliminate to a great extent the deleterious selling on the part of our evening contemporary,[24] which in the long run is not to the best interests of the manufacturer.

When Mr. Kelley, who was called as a witness by the Government, was asked what he meant by eliminating to a great extent "deleterious selling" by the Item, his attempts to explain away what he had written obviously did not satisfy the district judge, who participated in the questioning (R. 93–96). The court in its opinion categorically stated that the memorandum illustrated

[23] Copies of the memorandum were sent to the various branch offices of Jann & Kelley, as well as to Messrs. Tims and Ladreyt (Ex. G–45, R. 1355, 1357).

[24] Mr. Kelley conceded that the words "evening contemporary" referred to the Item (R. 95).

the defendants' "purpose" (described *supra*, pp. 19–20) in adopting the unit rule for all general advertising (R. 1240).[25]

3. Local display advertising

Since 1935 appellant corporation's contracts with local display advertisers have provided that any amount of advertising carried in the States will be billed at the reduced rates granted by the States for volume lineage, but based upon the volume of lineage which the advertiser had contracted to purchase in the Times-Picayune (Fdg. 32, R. 1259). In other words, an advertiser's lineage volume in the Times-Picayune qualified him for the rate reduction offered by the States to buyers of the same quantity regardless of the volume of his advertising in the States. In addition, during the years 1938 to 1946, local display advertisers were given a reduction of one cent a line if they placed identical copy in both the Times-Picayune and the States (*ibid.*). These inducements have drawn some advertising from the Item to the States (*ibid.*).

SPECIFICATION OF ERROR TO BE URGED IN NO. 375

The district court erred in not including in its judgment provisions corresponding to those of paragraphs C and D of Section V of the judgment which the Government proposed in the district court.

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[25] The excerpts from the memorandum quoted in our brief (*supra*, p. 21) are quoted in the court's opinion (R. 1241).

SUMMARY OF ARGUMENT

I

Upon the facts, there is no doubt that advertising space in appellants' morning newspaper, the Times-Picayune, represents a unique product for advertisers and one which most of those who were subjected to appellants' unit rule deem essential. This rule, which compels those who wish to advertise in the Times-Picayune to carry the same advertisement in appellants' evening newspaper, the States, uses the leverage of the Times-Picayune's monopoly position in the morning newspaper field and its dominant position among New Orleans newspapers as a trade weapon against the competitive evening newspaper, the Item.

As this Court has stated, tying contracts "serve hardly any purpose beyond the suppression of competition." *Standard Oil Co.* v. *United States,* 337 U. S. 293, 305. When the monopoly of a patent is used as leverage to capture, by means of tying contracts, "any substantial market," such foreclosure of competitors is *per se* an unreasonable restraint of trade forbidden by Section 1 of the Sherman Act. *International Salt Co.* v. *United States,* 332 U. S. 392. While we recognize that the Sherman Act does not outlaw all tying contracts, the circumstances here clearly bring appellants' contracts under the ban of the Act. The tying product (space in the Times-

Picayune) has the leverage which attaches to monopoly power and position. In addition, appellants' tying contracts limit competition among vendors of the tied product (space in evening New Orleans newspapers) more drastically than do ordinary tying contracts of those involved in the *International Salt* case. This is so because the full impact of the injury caused by foreclosing competitors from a substantial market falls on a single competitor, the Item.

The situation presented in the instant case directly parallels that upon which this Court ruled in *United States* v. *Griffith*, 334 U. S. 100. It was there held that the Sherman Act is violated when a theatre circuit makes agreements with distributors of films which cover the exhibition of the particular distributor's films both in the circuit's closed towns (those in which it has no competition) and in its competitive towns, and which grant to the circuit's theatres in the latter towns substantial privileges over competing theatres. Similarly, the present appellants, with a monopoly in the morning newspaper field, "command the entrance for" advertisements into that field, employ that "monopoly power as a trade weapon against" their competitor, and use their "strategic" monopoly position to sell advertising space in the States "on a non-competitive basis in what would otherwise be [a] competitive situation[s]."

Appellants' tying contracts also have the same vice inherent in the practice of block-booking con-

demned in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 156–159, a practice whereby the licensing of one film was tied to the licensing of another film or group of films. The *Paramount* case held that where those who are dominant in a trade tie the sale of one article with that of another, so that the tied product and like products of competitors cannot be sold "on their individual merits," this effects a restraint of trade illegal under Section 1 of the Sherman Act. Appellants, who are dominant in the business in which they are engaged (publishing New Orleans newspapers), have tied sale of one product with that of another and thereby have prevented sale of space in the States and sale of space in the Item on the basis of their respective merits.

In view of the economics of the newspaper industry, appellants' tying contracts are pregnant not only with limitation of competition but also with its complete elimination. The business of publishing newspapers has long been a marginal one in which there have been heavy casualties. Fatalities have been particularly high among independent newspapers published in cities having also a morning and an evening newspaper which are under single ownership.

II

We submit that the district court correctly held that appellants have attempted to monopolize a part of interstate commerce, in violation of

Section 2 of the Sherman Act. As the trial court found, appellants adopted and enforced their tying contracts with intent to injure the one competitive New Orleans newspaper, the Item. Their tying contracts, entered into with such intent, tended to exclude the Item from the market for classified and general advertising in evening New Orleans newspapers. The dollar volume of this market is substantial, and a substantial portion of it was directly affected by appellants' tying contracts. The attempt to monoplize thus involved an "appreciable part" of interstate commerce, and came within the prohibition in Section 2 of attempts to monopolize "any part" of such commerce. *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 151.

III

The judgment entered by the district court recognized that in order effectively to prevent misuse of the Times-Picayune's dominant position, the decree must go beyond the mere prohibition of forced combination rates. Both combination rates and rates based upon the volume of advertising contracted for in the other paper, though optional in form, may have the economic effect of coercing the advertiser into using both papers. The present judgment's effort to deal with this

problem by prohibiting "using the dominant position" of the Times-Picayune to sell advertising below cost is inadequate in the following respects:

(1) The phrase "using the dominant position" invites relitigation of the use and effect of the Times-Picayune's dominance in determining the validity of each future rate. Since the dominance in the market established in this case will inevitably be a factor in any combined use of appellant's two papers, a specific prohibition of such use, where not justified by savings in costs, should be included in the judgment.

(2) The provision in the present judgment is inadequate in that it prohibits misuse of the dominant position to sell below *cost*. This would still permit large discounts harmful to competition and without economic justification. The judgment should prohibit the combined use of both papers at discounts below the amounts justified by savings in costs from such use. Since the cost data are peculiarly within appellants' knowledge and control, the burden of proving cost justification should be upon them.

(3) In order to dissipate the consequences of the buying habits created by appellants' unlawful conduct, the judgment should prohibit all combination rates for a period of three years.

ARGUMENT

I

Appellant corporation's general and classified advertising contracts are in unreasonable restraint of trade.

A. Those who wish to reach the New Orleans market through newspaper advertising must advertise in the Times-Picayune

The district court's finding that newspaper advertisers who desire to cover the New Orleans market must advertise in the Times-Picayune (Fdg. 17, R. 1256) has overwhelming support in the proof and related undisputed findings. Concededly the Times-Picayune is, and has been since 1941, the only daily morning newspaper published in New Orleans (Fdgs. 15, 20; R. 1255, 1256). Accordingly, all those who wish to appeal to the New Orleans public by means of newspaper advertising and who believe that effective appeal requires use of a morning paper must advertise in the Times-Picayune.

But newspaper advertisers seeking to reach the New Orleans market must use this paper not only because it stands alone in the morning field, but also because it is the outstanding New Orleans newspaper and has, for the advertiser, the unique values inherent in its dominant position. Appellant corporation has proclaimed, and the district court found, that "the Times-Picayune is the dominant newspaper of New Orleans and its trading territory" (Ex. G–18, R. 1305; Fdg. 15, R. 1255). For at least 20 years, it has outdistanced

all other New Orleans newspapers in circulation and volume of advertising (R. 223–4; Fdg. 15, R. 1255). Appellant corporation's Manager of General Advertising, in letters written to general advertisers in 1949, stated that the Times-Picayune is "the backbone of any advertising effort" in the New Orleans market (Ex. G–15, R. 1298; Ex. G–17, R. 1303).[26]

Because of its monopoly in the morning field, its wide advantage in circulation over other New Orleans papers, and its general "acceptance" in the New Orleans market, newspaper advertisers seeking to reach that market believe it essential to use the Times-Picayune.[27] The testimony of advertisers is confirmed by the figures showing that all but a small percentage of general advertisers in New Orleans daily newspapers advertise in the Times-Picayune. In 1949, only 13.5% of all such advertisers failed to use the Times-Picayune; in 1950, only 11.7% (Ex. G–109B, R. 1454; Ex. G–110–B, R. 1456).

B. Appellants' unit rule utilizes monopoly power to tie sale of one product to sale of another, in restraint of the trade of a competitor and of advertisers

As we have shown, use of the Times-Picayune is, in colloquial language, a "must" for news-

[26] He further wrote that advertising which is also carried in the Item or the States may be considered "supplemental" to that carried in the Times-Picayune (*ibid.*).

[27] See testimony of witnesses Porter, R. 280; Freifield, R. 285; Harris, R. 367; Kirschman, R. 502. See also Ex. G–37, R. 1344; Fdg. 17, R. 1256.

paper advertisers wishing to attract the trade and attention of residents of New Orleans and its vicinity. Accordingly, when appellant corporation refuses to permit classified or general advertisements in the Times-Picayune unless they are also carried in the States, it ties sale of one product (space in the Times-Picayune) to sale of another (space in the States), and uses its monopoly position in one field (morning) to gain an advantage in trade over the Item, a competitor in another field (evening).

Appellants have sought to escape the force of the decisions condemning conduct of this kind, by contending that the Times-Picayune and the States are merely different editions of a single newspaper published "round-the-clock," and by contending that what they sell to advertisers is circulation, i. e., access to readers, not space in particular newspapers. It is appropriate to meet and dispose of these contentions before dealing with the legality of appellants' acts under the decisions construing and applying the antitrust laws.

The trial judge, himself a resident of New Orleans, found that the Times-Picayune and the States are published as "two separate and distinct newspapers" (Fdg. 12, R. 1255). He conservatively found that the two papers "reach separate groups of readers" (*ibid.*). In fact, the evidence shows that in the first quarter of 1949 more than 63% of the States' home subscribers in New

Orleans were not subscribers to the Times-Picayune.[28] He found that the papers "have an entirely different and distinctive make-up and appearance" (*ibid.*). Letters to general advertisers written by appellant corporation's Manager of General Advertising put the matter more vividly—the make-up of the two papers, he wrote, "is as different as the New York Times and the New York Journal-American" (Exs. G–15, G–17; R. 1299, 1304). The district judge also found, as the evidence establishes,[29] that the two papers "are produced, in part, by separate organizations" and "have separate news, feature and editorial content" (Fdg. 12, R. 1255).

Appellants have treated the Times-Picayune (published daily as a morning paper) and the States (published daily as an evening paper) as "separate newspapers" (Fdg. 12, R. 1255). Indeed, appellants have, in various connections, for-

[28] In August 1949 appellant corporation's Manager of General Advertising advised general advertisers that "more than 35,000 families in New Orleans subscribe to the N. O. States which do not have The Times-Picayune weekday delivered to their homes" (Exs. G–15, G–17; R. 1299, 1304). The same letters reported that, for the first three months of 1949, the States had 55,451 home subscribers in New Orleans (*id.*, R. 1298, 1303).

[29] Officers of appellant corporation testified that the two papers have separate news staffs, different editors, managing editors, city editors, editorial writers, and cartoonists, and that they contain different features, syndicated columns, editorial cartoons and comics, although permission is sometimes obtained to run the same syndicated feature in both newspapers (Tims. R. 193–196; Healy, R. 611–628).

mally described the papers as separate and distinct.[30] They have repeatedly solicited advertising upon the basis that the Times-Picayune and the States are entirely separate papers.[31] Advertisers have been urged to use both papers because they will thereby get "two newspapers at one low cost."[32] Appellants have emphasized that the "tough rivalry" between the staffs of the two papers contributes to "the completely different audience each attracts". (Ex. G–142, R. 1485).

Appellants' jurisdictional statement apparently recognizes the weakness of the attack on the finding that the Times-Picayune and the States are published as separate newspapers, and suggests that even if they are separate newspapers in the eyes of their readers and subscribers, this is of no concern to advertisers, who seek merely opportunity to reach a given volume of readers. The

[30] An historical account of appellant corporation's operations appearing in the Times-Picayune in 1937 reports that, upon purchase of the States in 1933, its Sunday edition was merged with the Times-Picayune but the "week-day States continued its separate existence" (Ex. G–152, R. 1553). Appellant Tims testified before the War Production Board in 1944 that, following the purchase of the States, "we elected to keep it as a separate newspaper" (Ex. G–103, R. 1435). Appellant Murray in 1949 wrote to a general advertiser that the States, although owned and operated by appellant corporation, "is a separate and distinct unit in the local newspaper field" (Ex. G–69, R. 1387).

[31] Exs. G–15–G–17, R. 1298–1304; Exs. G–43–G–44, R. 1351–4; Ex. G–69, R. 1387; Ex. G–103, R. 1435; Ex. G–142, R. 1485; Ex. G–152, R. 1553.

[32] Exs. G–53–G–54, R. 1370–1; Exs. G–56–G–57, R. 1373–1; Ex. G–59, R. 1376.

argument seems to run as follows: The compulsory unit rule requiring those who advertise in the Times-Picayune to advertise also in the States is not a sale of one product (space in the Times-Picayune) tied with another (space in the States). Sale of space in either paper is sale of the same thing—reader access. Under the unit rule, all reader access which appellants control is sold in one bundle, and advertisers are not permitted to purchase such access in separate bundles, one constituting the Times-Picayune's circulation and the other the States' circulation.

Under appellants' theory that the sale of access to potential customers through different advertising media is the sale of different units of the same product, a dominant newspaper could legally require an advertiser to purchase advertising time over a radio station owned by the same company even though the effect might be to drive a competing radio station out of business.[32] Cf. *Lorain Journal Co.* v. *United States*, 342 U. S. 143. But, aside from this consideration, the portrayal of appellant corporation as a trader selling a single commodity only in bulk does not square with the controlling facts. Sale of advertising space in the Times-Picayune and sale of such space in the States are, in fact, the vending of different products as is shown by appellants' representations to advertisers that those who use both papers get

[32] Appellants have taken the position in this case that all advertising media compete with each other.

"two newspapers" at a bargain rate (*supra*, p. 32). Furthermore, from the standpoint of restraint of trade, appellants' application of the unit rule differs widely from a trader selling only in bulk. Such a selling practice ordinarily does not restrain trade, limit freedom of trade, or injure a competitor, because those not wishing to purchase in bulk will turn to other sources of supply. Appellants' unit rule, on the other hand, does severely constrain trade. It forces many advertisers to take what they do not want—space in the States, and it deflects trade from a competitor, the Item, to the substantial injury of the rival paper. In the three following paragraphs, we briefly expand propositions here summarily stated.

The unit rule cannot be regarded as merely a device whereby sale of a certain volume of reader access (that represented by the Times-Picayune's circulation) is tied to sale of an additional volume of reader access (that represented by the States' circulation). Readers of the Times-Picayune and readers of the States are not, from the advertiser's standpoint, equal and interchangeable per units of 1,000, just as 1,000 readers of the New York Times are not the advertising equivalent of 1,000 readers of the N. Y. Journal American. One is a morning, the other an evening paper, and they are otherwise separate and distinct newspapers. In the words of appellant corporation, each attracts a "completely different audience" (Ex. G-142, R. 1485). Further

more, the evidence establishes that the general advertisers who used New Orleans newspapers did not select their medium of advertising solely or primarily on a circulation basis. In 1949 the Times-Picayune had less than 48% of the total net paid circulation of the three New Orleans papers,[34] but in that year 22.7% of such advertisers used only the Times-Picayune while only 1.9% used exclusively the two afternoon papers (Ex. G–109B, R. 1454). In other words, the percentage using exclusively a morning paper (with 48% of total circulation) was 12 times the percentage using exclusively the two evening papers (with 52% of total circulation).

The unit rule forced purchase of unwanted space in the States by many classified advertisers and many general advertisers (Fdgs. 22, 29, R. 1257, 1258). Not only are the court's findings supported by substantial testimony (*supra*, pp. 12–13; 16–19), but they are confirmed by the sharp climb in the States' percentage of each of these two categories of advertising following the application to it of the unit rule (*supra* pp. 11–12, 16). And the evidence showing what general advertisers actually did in 1949, when they had a free choice in selecting the newspaper or newspapers which they believed best served the needs, con-

[34] The net paid circulation in 1949 of the three New Orleans papers was as follows:

Times-Picayune (Ex. G–146, R. 1494)	174,819
States (Ex. G–147, R. 1521)	95,298
Item (Ex. G–148, R. 1535)	97,112
Total	367,229

clusively establishes the wide effect of the unit rule in restraining trade of advertisers. In that year, of all general advertisers who made use of a New Orleans newspaper, 22.7% used only the Times-Picayune, 9.7% only it and the Item, 2.0% only the States, and 1.9% only the Item and the States (Ex. G-109B, R. 1454). The unit rule barred each of these choices, which together represent 36.3% of all 1949 general advertising accounts in New Orleans newspapers.

When the unit rule forced an increase in purchase of advertising in the States, the pinch upon the rival evening newspaper, the Item, was inevitable. The rule shut off as customers of the Item all advertisers who deemed it essential to use the Times-Picayune and who, for budgetary or other reasons, restricted further advertising in New Orleans newspapers to one evening paper (*supra*, pp. 18–20). Not only did the rule exclude the Item from these potential customers, but, as the court found upon substantial evidence, one of appellants' purposes in adopting the rule was to curtail substantially the competition of the Item (*supra*, pp. 19–20). Thus the unit rule partially excluded a competitor from the market, and was designed to do this.

C. Appellants' tying contracts are in unreasonable restraint of trade and violate Section 1 of the Sherman Act

In *Standard Oil Co.* v. *United States*, 337 U. S. 293, this Court acutely analyzed the characteristics and effects of tying contracts, and

pointed out that they utilize control over the tying product to secure a captive group of purchasers for another product. The Court said (pp. 305–306):

> Tying agreements serve hardly any purpose beyond the suppression of competition. * * * If the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway. * * * In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one.

The Court concluded (p. 306) that the existence of market control of the tying product provides strong basis for the presumption that such control has been or will be used "to limit competition in the tied product also." [35]

In some circumstances, a tying contract violates Section 1 of the Sherman Act without regard to the degree of market control over the tying product possessed by the defendant, or the proportion of the trade in the tied product which he has obtained, or the actual effect of the tying contract upon competition. *International Salt*

[35] While the Court in the *Standard Oil* case ruled only upon violation of Section 3 of the Clayton Act, the Court's analysis of tying contracts is plainly directed toward their general nature and effect rather than their legality under particular statutory provisions.

Co. v. *United States*, 332 U. S. 392.[36] The tying contracts involved in *International Salt* were held to violate both Section 1 of the Sherman Act and Section 3 of the Clayton Act, and summary judgment against the defendant was affirmed, notwithstanding that such judgment precluded trial of factual issues bearing upon the question whether the restraints imposed by the tying contracts were unreasonable within the meaning of the Sherman Act. The Court held that the fact that competitors were foreclosed from a substantial market was determinative of illegality. It declared (p. 396): "Not only is price-fixing unreasonable, *per se* [citing cases], but also it is unreasonable, *per se*, to foreclose competitors from any substantial market."

While restraint upon competition is implicit in all tying contracts, the Government recognizes that some such contracts have greater potency for restraint than others. Notwithstanding the

[36] The facts standing admitted were that the defendant had leased two patented machines for utilizing salt in industrial processes; that the leases required the lessees to purchase from the defendant the salt used in the leased machines; that about 900 such leases were outstanding; that the defendant was the country's largest producer of salt for industrial purposes; and that in the year prior to suit he had sold about $500,000 worth of salt for use in the leased machines. But, as this Court observed in the *Standard Oil* case (337 U. S. at p. 305), it was not established in the *International Salt* case that machines equivalent to defendant's were unobtainable, what proportion of the business of supplying industrial salt was controlled by the defendant, or the actual effect of the tying contracts upon competition.

broad language of the opinion in the *International Salt* case, we assume that when legality under Section 1 of the Sherman Act is in issue, there may be circumstances in which it is appropriate to inquire into the degree of leverage given by the defendant's market control of the tying product, and the actual limitations upon competition among sellers of the tied product resulting from the tying contract. In other words, the Government is not contending that Section 1 of the Sherman Act outlaws *all* tying contracts.

A patented article presumptively confers a high degree of market control, and corresponding leverage when it is used as the tying product. The decision in *International Salt* means that the restraints imposed where a patented article is the tying product offend against Section 1 of the Sherman Act provided the trade in the tied product from which competitors are excluded represents a "substantial market." In short, where the monopoly of a patent is used as leverage to capture any substantial market not within the patentee's legal monopoly, the restraint is *per se* illegal. Whether or not the patented article is in substantial competition with patented or unpatented articles of a like kind or performing a like function is immaterial.

In the present case, appellants have an actual, not a legally conferred, monopoly of the tying product—advertising space in the only New Or-

leans morning newspaper. The degree of leverage conferred by this monopoly of the tying product depends upon the intensity of the desire of newspaper advertisers to obtain the tying product. We have elsewhere shown that, because the Times-Picayune stands alone in the morning field and because it far surpasses all other New Orleans newspapers in circulation and reader acceptance, the great majority of those who wish to appeal to the New Orleans market through the medium of newspaper advertising consider it essential to advertise in the Times-Picayune. *Supra*, pp. 28–29. This, moreover, was the finding of the district court (Fdg. 17, R. 1256). We submit, therefore, that the leverage of the tying product involved here is substantially the equivalent of the leverage of the patented machines which constituted the tying product in the *International Salt* case.

We next examine the effects of appellants' tying contracts upon the Item, which is the competing seller of the tied product. To the extent that the contracts cause advertisers to purchase space in the States which they otherwise would not purchase, there is absorption of the money budgeted by advertisers for purchase of space in New Orleans newspapers and corresponding limitation upon outlets for sale of advertising by the States' competitor, the Item. While the evidence does not, and obviously could not, establish the exact dollar amount of the States' increase in business, and of the Item's loss in business, caused by appellants' tying contracts, the findings and

evidence show that such increase and such loss were substantial (*supra*, pp. 11–12, 16–19).[37]

In at least one important respect, appellants' contracts have a greater tendency to eliminate competition than did the tying contracts in *International Sale*. There the defendant preempted the salt purchases of users of its patented machines, but the business thus lost by competitors was a loss spread among all those engaged in selling salt suitable for use in the leased machines. As to any one competitor, the impact of the limitation of competition was diluted. In contrast, in the instant case there is only one competitor, and the Item bears the entire loss when appellants' tying contracts divert business to the States.

The situation presented here is closely analogous to that upon which this Court ruled in *United States* v. *Griffith*, 334 U. S. 100. In that case certain chains of motion picture theatres had theatres both in closed towns (those in which there was no competing theatre) and in towns in which there were competing theatres. The chains negotiated with distributors of films so-called master agreements which covered exhibition of

[37] In the *International Salt* case there likewise was no showing of the dollar amount of business lost by competitors by reason of the tying contracts there involved. The tying contracts excluded competitors from all the business represented by purchases of salt for use in the machines leased by the defendant, but it necessarily was mere surmise how much of this business competitors would have obtained absent the tying provisions of the leasing contracts.

the particular distributor's films in all theatres of the chain, both those in closed towns and those in competitive towns. The contracts gave the theatres in the latter towns certain privileges over the theatres with which they competed. This Court accepted, for purposes of decision, the finding by the district court that the master agreements were not made with specific intent to restrain trade or to build a monopoly.

These facts were held to show violation of the Sherman Act. The Court said (p. 107) that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." In further exposition of this statement, the Court said (pp. 107–108):

> A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. * * * When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. * * *
>
> The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations. * * *

> If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed.

The Court also declared (p. 108) that the Sherman Act bans use of monopoly power "to stifle competition by denying competitors less favorably situated access to the market."

The present appellants, having a monopoly in the morning newspaper field in New Orleans (similar to that of Griffith in towns in which there were no competing theatres), "command the entrance for" all advertisements into that field. When they use that "strategic position" to secure for their evening paper (the equivalent of Griffith's theatres in competitive towns) advertisements which it could not independently obtain, and to prevent advertisers from choosing between that paper and a competitor on the basis of the respective merits of the two evening papers, they illicitly employ "monopoly power as a trade weapon" against a competitor.

Possibly appellants will attempt to distinguish the *Griffith* case upon the ground that there a monopoly position in certain cities was used as a trade weapon against competitors in *other* cities, whereas here a monopoly position in the morning newspaper field in New Orleans was used as a trade weapon against a competitor in the evening newspaper field in the *same* city. But this factual difference is without legal significance. Appellants' use of monopoly power in furtherance of

expansion of their domain is essentially the same as it would be if they owned and published the Times-Picayune and a Baton Rouge newspaper competing with another Baton Rouge paper, and general advertisers were required to place in appellants' Baton Rouge paper all advertisements placed in the Times-Picayune.

Nor is the *Griffith* case distinguishable upon the ground that the monopoly power of the defendants in that case rested upon a multiplicity of monopoly towns. The Court there said (334 U. S. 107) that monopoly power "may be a feeble, ineffective weapon where he [the owner of a theatre circuit] has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places." The critical consideration is the fact of monopoly power, not the factors creating it. Thus, a theatre chain having a monopoly of the theatres in the principal city of the area in which it operated might well have monopoly power giving greater leverage to obtain advantages for its theatres in competitive towns than a chain whose theatres were chiefly in closed towns, but in towns which were relatively small and unimportant. The actual leverage exerted by the Times-Picayune's dominant position among New Orleans newspapers and its monopoly position in the morning field, as previously shown (*supra*,

pp. 28–29), brings the case squarely within the principles of the *Griffith* decision.

Nor can the present case be distinguished from the *Griffith* case upon the ground that there the facts indicated some combining of the buying power of two or more affiliated corporations. See 334 U. S. at p. 102. This Court, in holding that the Griffith defendants had violated the Sherman Act because they had used monopoly power to procure the licensing of films on a non-competitive basis in what would otherwise be competitive situations, said (p. 108):

> That is the effect whether one exhibitor makes the bargain with the distributor or whether two or more exhibitors lump together their buying power, as appellees did here. It is in either case a misuse of monopoly power under the Sherman Act.

The vice inherent in appellants' general and classified advertising contracts is the same vice inherent in block-booking of motion picture films, that is, the licensing of a feature film or group of such films on condition that the exhibitor will also license another such film or group of films. In *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 156–159, this Court held block-booking illegal under Section 1 of the Sherman Act. Its vice was that it "prevents competitors from bidding for single features on their individual merits" (334 U. S. at 156–157). The fact that the films were copyrighted did not remove block-

booking from the condemnation of the Sherman Act, because the practice "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first" (334 U. S. at 157). The Court held that this enlargement of the monopoly of the copyright comes within the principle that the owner of a patent who conditions its use on the purchase or use of patented or unpatented materials goes beyond the monopoly rights of his patent and is thus subject to the prohibitions of general law, including those of the antitrust laws (*ibid.*).

The *Paramount* case thus held that where those dominant in a trade tie the sale of one article with that of another, so that the tied article and like articles of competitors cannot be sold on the basis of their respective merits, there is a restraint on freedom of competition forbidden by Section 1 of the Sherman Act even when the articles involved have such immunity from the Act as patent or copyright law may confer. *A fortiori* such a tying contract violates the Act when no such sanction is or could be asserted as to the tying or tied product. In either instance, a monopoly position is used as leverage to extend the monopolist's control into other fields. It is immaterial whether the monopoly position is conferred by law—the situation in the *International Salt* and *Paramount* cases—or is otherwise

obtained—the situation in the instant case and in the *Griffith* case.

In view of the economics of the newspaper industry, the restraints imposed by appellants' tying contracts have a particularly deleterious effect on competition. For several decades, the business of publishing newspapers has been a marginal one, and there have been heavy casualties.[38] Moreover, over two-thirds of newspaper revenue is derived from advertising.[39] In these circumstances, tying contracts which deflect advertising revenue from a competitor are a potent force tending to limit, and ultimately eliminate, competition.

In the present case the district court found, on the basis of defendants' evidence, that the "vast majority" of those who published both a morning and an evening newspaper in the same city have been applying the unit rule to general advertising (Fdg. 26, R. 1258).[40] There has also been a drastic decline in the number of cities having daily

[38] There were 2,600 daily newspapers in the United States in 1909, 2,335 in 1921, 2,044 in 1931, and 1,854 in 1947, so that there were 90% of the 1909 total in 1921, 79% in 1931 and 71% in 1947. *Local Monopoly in the Daily Newspaper Industry*, Comment, 61 Yale Law Journal 948, note 12, at p. 949.

[39] *Id.*, p. 977.

[40] The court made a like finding as to classified advertising (Fdg. 20, R. 1256).

newspapers of more than one ownership.[41] We do not suggest that the facts to which we have referred are to be treated as cause and effect. But we submit that the effect upon competition of appellants' tying contracts may properly be judged in the light of the independent newspaper's precarious existence when a morning and an evening newspaper which are under single ownership are published in the same city.

II

Appellants have attempted to monopolize general and classified advertising in New Orleans evening newspapers

If this Court determines that the appellant corporation's general and classified contracts violate Section 1 of the Sherman Act, it may find it unnecessary to pass upon the conclusions of the district court (Concls. 5 and 6, R. 1262) that appellants are violating Section 2 of the Sherman Act by engaging in an attempt to monopolize a part of the trade and commerce among the several states. *Cf. Standard Oil Co. v. United States*, 337 U. S. 293, 314. The violation of Section 1 furnishes basis for the injunctive provisions of the district court's judgment, and for the further relief sought by the Government's appeal in No.

[41] Of all American cities having newspapers, those in which there were papers under more than one ownership constituted 42% of the total in 1920 and only 8% of the total in 1951 (*Local Monopoly in the Daily Newspaper Industry*, Comment, 61 Yale Law Journal 945, note 16; at p. 950).

375. We nevertheless believe and urge that the facts found by the district court disclose a violation of Section 2.

To establish that a series of contracts is in restraint of trade in violation of Section 1 of the Sherman Act, it is not necessary to prove that the defendants intended to effect a restraint of trade if, in fact, trade has been restrained. *United States* v. *Griffith*, 334 U. S. 100, 105. A person is presumed to intend the natural and probable consequences of his act, and subjective intent is not a necessary element of the offense. *United States* v. *Patten*, 226 U. S. 525, 543. Where, however, the charge is attempting to monopolize and the conduct under attack falls short of the monopolization prohibited by Section 2 of the Act, it may be necessary to show that defendants intended to achieve a monopoly. See *Swift & Co.* v. *United States*, 196 U. S. 375, 396.

The district court found (Fdg. 31, R. 1259):

> The intention of the defendants (except the defendant Coleman) in adopting the forced unit rates on all general and classified advertising was * * * to substantially diminish the competitive vigor of the Item.

There is ample evidence in the record to support that finding. The Item was the only newspaper competing with appellants' papers; if its "vigor" could be sufficiently diminished appellants would have achieved a newspaper monopoly in New Orleans.

Mr. Kelley, in his memorandum (Ex. G–45, R. 1355, 1357) quoted in the district court's opinion (R. 1241; see note 25, *supra*, p. 22), stated that the unit rate would greatly reduce "deleterious selling" by the Item. His memorandum and explanatory testimony are an admission that one of the purposes in adopting the unit rate was to hinder the Item in competing for general advertising in New Orleans.[42] Proof of purpose to restrain the ability to compete is classic proof of an intent to monopolize.

In *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 150–151, this Court upheld a conclusion by the district court for the Northern District of Ohio that appellants Lorain Journal Company and three of its officers had attempted to monopolize advertising in Lorain, Ohio, in violation of Section 2 of the Sherman Act. The district court's conclusion rested in part upon a finding that defendants there had attempted to prevent their principal competitor from obtaining local advertising from Lorain merchants and thereby attempted to destroy that competitor. See Record (p. 531, Fdg. 17) in No. 26, October Term, 1951.

[42] Mr. Kelley's memorandum (*supra*, p. 21) also shows that appellants had reason to believe that general advertisers who had formerly used only the Times-Picayune or the Times-Picayune and the Item would object to the adoption of the unit rate (Ex. G–45, R. 1357). It is thus apparent that in adopting the unit rate on general advertising, appellants knew that it would force some advertisers, against their will, to use the States or to discontinue the Item, or both.

There is, of course, a difference between the tactics of the present appellants and those of the defendants in the *Lorain Journal* case. The means used here are more subtle, and perhaps more indirect, than the exclusive dealing requirement in *Lorain Journal*. But both cases have this in common: in each, as the respective trial courts found, one of appellants' objectives was to injure their principal competitor. Proof of such an intent, we submit, is all that is required to reach the conclusion that appellants have attempted to monopolize general and classified advertising in the evening field in New Orleans. Particularly is this so where there is indisputable evidence that the effects of appellants' activities have been sharply to decrease the share of the market obtained by their competitor, the Item.[43]

The district court found that a large number of publishing companies in other cities had unit rates on classified and general advertisting before the appellant corporation adopted its unit rates (Fdg. 20, R. 1256; Fdg. 26, R. 1258). Appellants in their jurisdictional statement have indicated that they will contend that evidence supporting these findings tends to prove the absence of any intent on their part to monopolize in New Or-

[43] See *supra*, pp. 12, 16. The Item's share of evening classified advertising declined from 65% in 1934 to 32% in 1950 (Ex. G–106B, R. 1448); its share of general advertising declined from 49.2% in 1949 to 42.1% in 1950 (Ex. G–108B, R. 1452).

leans. That other publishers in other cities engaged in similar practices does not exonerate appellants. See *United States* v. *National City Lines, Inc.*, 186 F. 2d 562, 572 (C. A. 7), certiorari denied, 341 U. S. 916; *United States* v. *New York Great Atlantic & Pacific Tea Company*, 173 F. 2d 79, 89 (C. A. 7); *cf. Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214. But if the practices of other publishers in other cities are relevant here, even more relevant is the evidence offered by the Government in rebuttal showing the demise of daily newspapers in cities where competing publishers adopted unit rates. This evidence, offered solely as bearing on defendants' intent (R. 1193–1194), shows that in each of 20 of 45 cities, a newspaper went out of business or ceased daily publication after competing newspapers in the same city adopted forced combination advertising rates.[44]

The district court in its opinion described the commerce appellants attempted to monopolize as being that "segment of the afternoon newspaper general and classified advertising field which was represented by those advertisers who also required morning newspaper space and who could not because of budgetary limitations or financial inability purchase space in both afternoon newspapers" (R. 1251).

The segment of commerce thus described was undoubtedly monopolized. It also seems clear

[44] R. 1185–1223; Ex. G-153, R. 1551; Ex. G-154, R. 1569.

that appellants attempted to monopolize all classified and general advertising in the evening newspaper field in New Orleans. The fact that appellants attempted to monopolize only specified classes of advertising in New Orleans does not invalidate the conclusion of the trial court that appellants attempted to monopolize within the meaning of Section 2 of the Sherman Act. The words of that Section make it unlawful to attempt to monopolize "any part" of interstate commerce. Decisions of this Court establish that it is not necessary to prove either an attempt to monopolize the entire market for advertising or to prove that competitors have been excluded completely from this market. *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268; *Lorain Journal Co.* v. *United States*, 342 U. S. 143.

In *Lorain Journal Co.* v. *United States*, 342 U. S. 143, this Court said (p. 151, n. 6):

> The reference in § 2 to an attempt to monopolize "any part of the trade or commerce among the several States" relates not merely to interstate commerce within any geographical part of the United States but also to any appreciable part of such interstate commerce. "The provisions of §§ 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of inter-

state commerce." *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.*, 293 U. S. 268, 279. See also, *United States* v. *Griffith*, 334 U. S. 100, 106; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225; *Montague & Co.* v. *Lowry*, 193 U. S. 38. See also *Bigelow* v. *R. K. O. Radio Pictures*, 327 U. S. 251; *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738, 744 (C. A. 3).

And it is unlawful to monopolize, and by the same token to attempt to monopolize, the trade or business of a specified or ascertainable class of customers. *United States* v. *National City Lines, Inc.*, 186 F. 2d 562 (C. A. 7), certiorari denied, 341 U. S. 916. See also *United States* v. *Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn.).

There were 889 advertisers who used New Orleans evening newspapers for general advertising in 1950, of which 766 used the States and 498 the Item (Ex. G 1103, R. 1456). The court below found that 58% of all general advertisers in the New Orleans market are affected by the unit rates of appellant corporation and that this constituted a substantial portion of the market (Fdg. 30, R. 1259). The dollar value of the commerce involved in evening general and classified newspaper advertising in New Orleans is substantial. Revenues of the appellant corporation from these

classes of advertising in the States alone in 1949 totalled $715,968.75 (Ex. G-8, R. 1289, 1293).[45]

Appellants' conduct, by excluding the Item from a large part of the market in New Orleans for general and classified advertising, has had an adverse effect upon that paper, as has been shown by the evidence already discussed. We submit that appellants' exclusion of their competitor from a substantial part of the market, coupled with their intent "to substantially diminish" its "competitive vigor" (Fdg. 31, R. 1259), constitutes an attempt to monopolize a part of trade and commerce within the meaning of Section 2 of the Sherman Act.

III

The relief granted by the district court is inadequate

For the relief in an antitrust case to be adequate, it must be "as effective and fair as possible in preventing continued or future violations of the Antitrust Act in the light of the facts of the particular case". *United States* v. *National Lead Co.*, 332 U. S. 319, 335. In achieving that end, the district court is not limited to prohibiting "the exact type of acts found to have been committed." *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409. On the contrary, effective relief requires a judgment adequate to insure that the violators are precluded "from entering into or acting under

[45] The record does not contain a comparable figure for the Item.

any similar agreement in the future." *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308. The trial court has the duty to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action * * * may range broadly through practices connected with acts actually found to be illegal." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88–89.

In the instant case, the illegal conduct, whose "ill effects" the decree in this case is to "cure," was grounded upon appellant corporation's misuse of the Times-Picayune's "dominant position" in the New Orleans trading area to restrain advertisers from "making an untrammeled choice" between the competing afternoon papers and to "diminish the competitive vigor of the Item" (Fdg. 31, R. 1259).

Elimination of the compulsory unit rates is the first step to be taken in curing the ill effects of the illegal conduct. That is dealt with in paragraphs A and B of Section V of the district court's judgment (R. 1264). In brief, those provisions prohibit appellant corporation from selling advertising in any paper it publishes on condition that advertising be purchased in any other of its papers, and from refusing to sell advertising separately in each newspaper it publishes. See *supra*, p. 9.

But the mere prohibition of these "'specific illegal practices'" will not of itself, we submit, effectively "pry open to competition * * * [the] market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States,* 332 U. S. 392, 401. Even with the compulsory unit rates outlawed, the way still remains open for appellants to misuse the Times-Picayune's dominant position in the New Orleans trading area to restrain advertisers and injure the Item. For, as long as the Times-Picayune retains its dominance, discounts offered by appellants to advertisers upon the basis of patronage of both the Times-Picayune and the States may be employed to coerce use of the States rather than the Item.

Such discounts might take at least two forms, each of which has been used in the past. A rate lower than the sum of the separate rates might be given to all advertisers who publish the same advertisement in both the Times-Picayune and the States. Appellant corporation used this optional combination rate for general advertising from 1933 until 1940 (Fdg. 23, R. 1257). Or quantity purchasers of advertising in the Times-Picayune who also buy some space in the States might be charged at the regular States' rates, but based on the lineage contracted for in the Times-Picayune. Appellant corporation has used this latter method

since 1935 in connection with local display advertising (Fdg. 32, R. 1259).[46]

An "optional" combination rate which does not in terms compel an advertiser to use the States as well as the Times-Picayune can nevertheless be so adjusted as to amount to economic coercion to use the combination. Most of those who advertise in any New Orleans newspaper feel compelled to use the Times-Picayune (see *supra*, pp. 28–29), and an optional combination rate structure under which those who place advertisements in both of appellants' newspapers receive an arbitrarily large concession or discount from the newspapers' separate rates will induce use of both papers, to the injury of the competing newspaper. Appellant corporation has been shown to have a proclivity to use its dominant position as a trade weapon against its competitor, and any rate structure which ties the advertising in one of its newspapers to the advertising purchased in its other newspaper is suspect. In any event, "doubts [as to the scope of relief] should be resolved in favor of the Government." *Local 167* v. *United States*, 291 U. S. 293, 299.

Similarly, basing advertising rates in one of appellants' newspapers upon the volume of advertising contracted for in the other, a practice

[46] The district court found that the effect of this method was to draw "some advertising" from the Item to the States (*ibid.*), but did not hold it to be unlawful.

which appellants have employed in local display advertising, provides an alternative means of achieving the objective which motivated their adoption of forced combination rates. Unless barred by the court's judgment, appellants would be free to offer separate rates for each newspaper under rate schedules which grant extreme discounts on advertising in the States, based upon the volume of advertising purchased by the advertiser in the Times-Picayune. Such a rate structure would induce advertisers to deal with the appellant corporation to the exclusion of its competitor.

The district court recognized that such use of other means to achieve the same end as the unit rule required a decree going beyond mere prohibition of forced combination rates. In addition to this prohibition, the judgment (Sec. V, par. C) enjoins appellant corporation from (R. 1264–1265)—

> Using the dominant position of the defendant, The Times-Picayune Publishing Company, in the morning field, to sell any newspaper advertising at rates lower than those approximating either (1) the cost of producing and selling such advertising or (2) comparable newspaper advertising rates in New Orleans;
>
> Provided that the rates for the sale of general, classified and local display newspaper advertising initially adopted by the defendant, The Times-Picayune Publishing

Company, after this judgment becomes final, shall with due notice to the office of the Attorney General be presented by said defendant to this Court for approval under the terms of this Section V of this Final Judgment, and subsequent rate cards may thereafter be presented for approval.

In the district court the Government had proposed different and somewhat more specific provisions for dealing with the same problem; these are set forth in full in the note below.[47] The

[47] These provisions would have enjoined the defendants from directly or indirectly (R. 1275–1276):

C. Entering into, adhering to or claiming any right under any contract, agreement, or understanding for the sale of advertising space in any single newspaper where such space is not sold in combination with advertising space in any other newspaper published by the defendants or any of them, the rate for which is based upon or determined by the volume of advertising space to be purchased or purchased in any other newspaper published by the defendants or any of them.

D. Entering into, adhering to or claiming any right under any contract, agreement, or understanding for the sale of advertising space in more than one newspaper published by the defendants or any of them, the combined rate for which is:

1. During a period of 3 years following the effective date of this final judgment, lower than the sum of the rates for the same amount of advertising space when purchased separately in each of the newspapers published by defendants or any of them which is included in the combined rate, or

2. After a period of 3 years following the effective date of this final judgment, lower than the sum of the rates for the same amount of advertising space when purchased separately in each of the newspapers published by the defendants or any of them which is included in the combined rate, minus such amount as the defendants or any of them can

following simplified version of these provisions is submitted as a substitute for paragraph C of Section V of the district court's judgment (quoted *supra*, pp. 59–60):

> Selling advertising space in any newspaper published by it at rates which are dependent in any way upon the purchase by an advertiser of advertising space in any other newspaper published by it, except to the extent that lower rates are justified by savings in cost resulting from the production and sale of advertising of said advertiser in more than one newspaper, and in any proceeding based on violation of the judgment the defendants shall have the burden of establishing such cost justification:
>
> Provided that for a period of three years following the effective date of this final judgment The Times-Picayune Publishing Company is enjoined from selling advertising space in more than one newspaper at a combination rate which is lower than the sum of the rates for the same amount of advertising space when purchased separately in each of the newspapers published by it.

The discussion below will explain the reasons for the Government's suggestion that this simplified alternative of the judgment provisions which it

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show represents savings in costs to the publisher or publishers resulting from the production and sale of such advertising in combination.

proposed in the court below be substituted for paragraph C of Section V of the judgment of the district court.

Our present concern is not with whether the judgment provisions presently advanced be accepted *in haec verba* in lieu of the provision adopted by the district court, but with certain substantive deficiencies in the judgment entered by the court below. Our objections to that judgment are based upon both its ambiguity and its failure to go far enough.

1. The district court's judgment enjoins appellant corporation from "using the dominant position" of the Times-Picayune to sell advertising at rates lower than cost or those of comparable newspapers (*supra*, p. 59). Inasmuch as the Times-Picayune has the dominant position in the New Orleans market, that position inevitably is a factor in any combined use of appellant corporation's two papers. Certainly the issue of dominant position and its use and effect should not have to be relitigated in determining the validity under the judgment of each future rate adopted by appellant corporation. "The generality of this provision of the decree bids fair to call for a retrial of a Sherman Act case any time a citation for contempt is issued." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186. The Government submits that the proper objective is to prevent the adoption of any rate structure not justified by cost savings which give more favor-

able rates when both of appellant corporation's papers are used than when one is used separately. We submit that this result can best be achieved by more specific prohibitions than that which in the district court's judgment is keyed to the phrase "using the dominant position" of the Times-Picayune.[48]

We propose, therefore, a specific prohibition of advertising rates which are dependent upon an advertiser's use of both of appellant corporation's newspapers, except for cost-justified discounts referred to in the next paragraph. Paragraphs C and D (note 47, *supra*), as proposed by the Government, achieved that result, but the simpler phrasing set out on p. 61, *supra*, may be preferable.

2 (a). The Government's proposals would permit discounts for advertising in both papers when justified by cost savings since such savings as actually result from the use of the two newspapers should be allowed to be passed on to adver-

[48] It is true that in the decree which the Government proposed in the district court, it used the phrase "using the dominant position" of the appellant corporation (Par. E, R. 1276). But the paragraph proposed was designed to follow and supplement the specific prohibitions of paragraphs C and D (R. 1275–6; note 47, *supra*), the failure to adopt which is the basis of the Government's present appeal. Upon further reflection, the Government believes that the specific prohibitions of its proposed paragraphs C and D (note 47, *supra*, pp. 60–61) or their equivalent as set forth in the text of this brief (*supra*, p. 61), provide adequate relief and render unnecessary the vaguer and more controversial language contained in the proposed paragraph E (R. 1276).

tisers. The inadequacy of the corresponding clause of the decree adopted below is that it merely prohibits sales of advertising at rates which are below cost (*supra*, p. 59). The significant difference between this and cost-justified rates can be shown by a hypothetical example. If the States' actual savings, by reason of not having to reset advertising used in the Times-Picayune, amounted to 8% of its total costs (and there were no other savings), but its profits amounted to 22% of costs (as did appellant corporation's in 1949 (see Ex. G–8, R. 1289)), the rate which could be charged under the decree below because of the combined use of the two papers would be 30% lower than if the advertising in each paper were paid for separately. For such a rate would not be below actual cost. But no more than an 8% discount would be justified by the actual saving in costs. A company which has used combination rates illegally should not be permitted to grant combination rate discounts greater than the actual cost saving. To permit a discount of possibly as much as 30% merely on the ground that appellant corporation is not selling at a loss might have as harmful an effect upon the competitive structure in New Orleans as the use of the forced combination rate. We urge, therefore, that the prohibition in the district court's judgment of sales "at rates lower than * * * the cost of producing and selling such advertising" is not appropriate, and that a proper prohibition is the one which we propose, namely,

any lower rate which is dependent upon use of both of appellant corporation's newspapers, except such lower rate as is "justified by savings in cost resulting from the production and sale of advertising of said advertiser in more than one newspaper" (*supra*, p. 61).

(b). The provision in the present decree quoted above (p. 59) does not impose upon appellant corporation the burden of proving its "cost". As the judgment now stands, the Government might have to prove appellant corporation's costs whenever it claimed that a rate was in violation of the decree—although this is not clear. We submit that, for obvious reasons, the burden of proving its savings in costs should be borne by the appellant corporation. Cf. Robinson-Patman Act, 15 U. S. C. Secs. 13 (a) and (b); *Federal Trade Commission* v. *Morton Salt Company*, 334 U. S. 37, 44–45. This is certainly fair in the present situation because the purpose of the cost justification will be to allow appellant corporation to continue, in some degree, a rate structure based upon advertisers' use of both papers. Obviously the cost data are peculiarly within the appellant corporation's control and knowledge. Cf. *United States* v. *Paramount Pictures*, 334 U. S. 131, 148.[49]

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[49] The second clause in the first paragraph of paragraph V-C of the court's judgment prohibiting appellants from adopting rates lower than "comparable newspaper advertising rates in New Orleans" (*supra*, p. 59) would in our opinion become unnecessary if this Court adopts our substitute proposal for that paragraph.

3. Section V–D of the Government's proposed judgment (note 47, *supra*), as well as the simplified version (*supra*, p. 61), contains an absolute prohibition for a period of three years against any form of combination rate for advertising in more than one newspaper published by the appellant corporation lower than the sum of the separate rates in the respective papers. The abolition of combination rates for a limited period of time would insure the dissipation of the consequences of the unfair and illegal competitive advantage which appellants secured over the competing newspaper. *See United States* v. *Paramount Pictures*, 334 U. S. 131, 148;[50] *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724; *United States* v. *National Lead Co.*, 332 U. S. 319, 335–7; cf. *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488.

Undoubtedly the rate schedules which have been in effect for almost twenty years for classified advertising and for three years for general advertising will have created buying habits on the part of advertisers. The halting of the momentum so acquired by appellants' unlawful conduct can be achieved only if the decree requires an immediate termination of all combination rates.

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[50] In this case, this Court said (*ibid.*):

"The District Court could therefore have eliminated clearances completely for a substantial period of time, even though, as it thought, they were not illegal *per se*. For equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy."

We submit that the three years suggested by the proposed decree would be a reasonable time to attain the objective of freeing the advertisers from their prior dependence upon appellant corporation's two papers. At the end of that time, the provision described in the preceding paragraphs permitting appellant corporation to charge a combined rate which would be lower than individual rates to the extent justified by cost savings would become effective.

We recognize that the formulation of appropriate decrees in antitrust cases ordinarily is a matter within the discretion of the district court. Nevertheless, we believe that this is a case where this Court is required to correct the deficiencies in the relief given by the district court "lest the public interest not be adequately protected by the decree as cast." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186. The problems posed by this case call for and permit "a more select treatment" (*ibid*) than paragraph V–C of the present judgment provides. Accordingly, we urge this Court to substitute the Government's proposals for that paragraph.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the district court should be directed to substitute for paragraph C of Section V of its judgment the provisions, or the substance thereof, proposed by the Government under point III of the Argument herein, and that the judgment of the district court should otherwise be affirmed

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